

2006

# Teaching Reflective Lawyering in a Small Case Litigation Clinic: A Love Letter to My Clinic Papers Presented at the UCLA/IALS Conference on Enriching Clinical Education

Ian Weinstein

*Fordham University School of Law*, [iweinstein@law.fordham.edu](mailto:iweinstein@law.fordham.edu)

Follow this and additional works at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship](http://ir.lawnet.fordham.edu/faculty_scholarship)



Part of the [Criminal Law Commons](#), and the [Litigation Commons](#)

---

## Recommended Citation

Ian Weinstein, *Teaching Reflective Lawyering in a Small Case Litigation Clinic: A Love Letter to My Clinic Papers Presented at the UCLA/IALS Conference on Enriching Clinical Education*, 13 *Clinical L. Rev.* 573 (2006-2007)

Available at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship/420](http://ir.lawnet.fordham.edu/faculty_scholarship/420)

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# TEACHING REFLECTIVE LAWYERING IN A SMALL CASE LITIGATION CLINIC: A LOVE LETTER TO MY CLINIC

IAN WEINSTEIN\*

*This article describes a live client, small case, teaching and learning centered, criminal defense clinic set in a high volume urban court. It offers concrete suggestions about how clinical educators can help students develop analytic and technical skills. The clinic model is conceived in three phases: giving students the opportunity to develop a contextualized understanding of the client; guiding students through strategic analysis and planning; and focusing students' litigation strategies on executing their tactical vision for their client. The article argues that this clinical setting structures the students' experiences so that they develop a complex and deeply moral lawyerly problem solving model.*

## INTRODUCTION

There is a predictable rhythm to our semester long clinic. The highpoint of the fall usually comes before Thanksgiving; in the spring it comes around spring break. I cannot say exactly when it will happen in any semester, but there is that morning when we have two or three cases on the court calendar, or we are meeting new clients at arraignment late in the semester. I find myself sitting in court, watching my students lawyer. And mostly I just watch. I think back to the first or second time I went to court with each of these students and compare their purposeful late semester strides with their first hesitant steps. They do not usually appreciate how far they have come in just ten weeks or so—but I do. I have watched very capable students make the leap to very capable young student lawyers. They are not ready for all that awaits them in practice, but they have taken a big step in that direction.

As I have become a more experienced clinician, I note that my work involves less teaching and more showing. My students flourish when our collaboration, representing our clients, moves to the fore-

---

\* Professor of Law and Director of Clinical Education, Fordham University School of Law and Executive Director, Lincoln Square Legal Services, Inc. I want to thank the organizers of the UCLA/University of London Sixth International Clinical Conference for giving me the opportunity to present a draft of this paper and Fordham University School of Law for the generous support I received while completing it. I also want to thank my research assistants, Cecilia Thomas and Debora Hoehne, for their wonderful work.

front and my teaching, as such, recedes. This reaffirmation of the clinical method's emphasis on experience has been a source of great joy to me.

Yet even as I chant that the clinic experience is "about the work" (of representing clients), it has also become abundantly clear to me that the optimal clinical experience involves more than just giving law students the opportunity to experience the law in action or act as lawyers. Clinic structure and supervision make a difference. I have talked with many students who have worked in or closely observed the same large urban criminal court in which my clinic students practice. Too often those students not in my clinic have only absorbed the institutional ideology.

I think of students who were paralegals in the District Attorney's Office and have explained to me that all the defendants are guilty, and bad people to boot. In their view, the good prosecutors are too busy to ensure everyone gets their just desert, the defense lawyers are either lazy or laboring heroically under impossible conditions, and the judges are all wise and reach just outcomes in each case. Students who have seen the same courts from the defense side, from positions in which they too had no clinically oriented supervisors, tell me that the institutional defenders are so experienced that they do not need to talk much with their clients or investigate their cases. Although I think those views factually inaccurate, their primary vice is their simplicity. They categorize and generalize far too much.

Many clinic students, on the other hand, begin to think and act as lawyers during our time together. They engage the specific situation and address the unique mix of intellectual, moral and emotional concerns presented by their client's situation. They begin to offer solutions that make sense—that account for the larger strategic picture, are tactically realistic, morally appropriate, and fit with the client's particular goals and situation. They are developing the distinctively lawyer mode of problem solving that has been analyzed as practical judgment,<sup>1</sup> reflective professional judgement,<sup>2</sup> craft,<sup>3</sup> or expertise,<sup>4</sup>

---

<sup>1</sup> Mark Aaronson offers one of the best discussions of lawyerly judgement, which he insightfully analyzes through the lens of Aristotelian practical wisdom or judgment. See Mark Neal Aaronson, *We Ask You to Consider: Learning about Practical Judgment in Lawyering*, 4 CLIN. L. REV. 247 (1998) (arguing that lawyering has both an intellectual and moral dimension and challenges us to integrate multiple perspectives and cope with uncertainty as we find contextualized solutions to our clients' problems).

<sup>2</sup> For the classic treatment of the role of reflection in professional practice, see DONALD SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983) (citing examples from engineering, architecture, management, psychotherapy, and town planning, arguing that intuition and art play a significant role in professional problem solving, and criticizing the professional model of technical rationality).

<sup>3</sup> Professor Karl Llewellyn wrote about the "crafts of lawyering," as his later work

and is the hallmark of the Anglo-American lawyer.

In this essay I offer my thoughts on how the clinic in which I have been supervising for several years—a live client, small case, teaching and learning centered, criminal defense clinic set in a high volume urban court—helps our students develop that distinctive problem solving skill, which I will alternatively call practical judgment, reflective professional judgment, craft and expertise. I understand all of these ideas as efforts to understand the mental process that enables lawyers to solve legal problems in a distinctively ‘lawyerly’ way.<sup>5</sup> In this essay I treat that process as a habit or developed disposition and leave the cognitive processes largely unexplored, in the proverbial black box.<sup>6</sup> My focus is describing how our small case clinic provides a useful structure in which our supervision helps our students develop a desirable version of the complex, deeply moral habit we know as good lawyerly problem solving. I do not write this essay to vaunt this model over the many other very valuable and wonderful ways of structuring a law school clinical experience. Rather, my purpose is to analyze how this rather old school clinic helps clinical educators achieve teaching and learning goals.

Our criminal defense clinic<sup>7</sup> is a fairly direct descendant of the

---

urged greater focus on “effective lawyering” through the study of “concrete work held close to earth . . . done against a background of solid theory, at least of theory about the sound methods of going about the job.” KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY*, 184 (1950).

<sup>4</sup> The notion that professional analysis flowed from a unique cognitive process known as expertise was developed in ALLEN NEWELL & HERBERT A. SIMON, *HUMAN PROBLEM SOLVING* (1972). For an important application of their work to clinical legal education, see Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 328 n.32 (1995).

<sup>5</sup> See Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161 (2002) (observing that various legal contexts require lawyers to assess past conflicts in light of future opportunities and carefully choose the different processes through which final decisions occur, and suggesting that each legal context requires lawyers to strategically assess, appreciate, and integrate legal principles and non-legal realities into their decision-making process).

<sup>6</sup> I have tried to peer into that box elsewhere. See Ian Weinstein, *Lawyering in the State of Nature: Instinct and Automaticity in Legal Problem Solving*, 23 VT. L. REV. 1 (1998) (applying Newell and Simon’s human problem solving model to lawyerly problem solving and arguing that, because law students cannot be directly taught to think like lawyers, each individual must take responsibility for the version of lawyerly thinking that he or she has developed for himself or herself).

<sup>7</sup> I have had the privilege of teaching in Fordham’s Criminal Defense Clinic with two very talented colleagues, Cheryl Bader and Martha Rayner, since 1999, although Martha Rayner has recently started her own clinic that represents clients detained at Guantanamo Bay. Students in our Criminal Defense Clinic work in teams representing clients accused of misdemeanors and violations in Manhattan Criminal Court. They also work on some related civil cases, as well as a small docket of post-conviction work. The students typically carry two or three cases and attend a weekly clinic seminar.

I have been a clinical teacher for more than 15 years and have supervised a variety of

clinics in which I learned and taught in the mid and late 1980s.<sup>8</sup> Both settings entail a weekly seminar, team supervision meetings and include significant live client litigation fieldwork. This individual case litigation format has its roots in the beginnings of clinical education.<sup>9</sup> It represents one aspect of the historic core of clinical education, or perhaps in the view of some, only its past.

There are five structural elements to our Fordham Criminal Defense Clinic. We run a 1) *live client*, 2) *small case*, 3) *teaching and learning centered* 4) *criminal defense clinic* 5) *set in a high volume urban court*. Each element plays an important role in helping our students develop their craft and practice it with care and deep concern for their clients, the community, and themselves. Representing clients with real problems helps students develop their moral and emotional habits. Clinic work is not just about winning a case, or doing well in a class; it is about responsibility to and for another human being. This is a very powerful moral and emotional experience. Although we do not say much about this larger theme at the outset, or even at the end of the course, we believe that how we treat our clients, and everyone else in the system, is a pressing moral concern. Like any morally impor-

---

cases. For my first five years at Fordham, I co-supervised a mixed civil and criminal caseload of mostly larger (high stakes, complex) federal cases. I then switched to a docket of small, administrative cases, mostly Social Security Disability and some special education cases. For a couple of semesters during which I had pressing writing obligations, my clinical teaching was limited to simulation courses, but I returned to live client supervision as soon as I could. In addition to my clinical teaching, I also teach two traditional courses, Evidence and Criminal Law, on a rotating basis.

<sup>8</sup> I was a student in the New York University Federal Defender Clinic from 1985-86. That clinic, supervised by Harry Subin, Chet Mirsky and Jim Cohen, combined a closely supervised field placement with the Federal Defenders with an in-house docket of complex appellate work and federal petty offenses. I was also a Fellow in the Georgetown Criminal Justice Clinic from 1986-88. There, I supervised third year law students who represented people accused of misdemeanors in the DC Superior Court, under the supervision of John Copacino.

<sup>9</sup> My wonderful clinical teachers also included the legendary Bill Greenhalgh at Georgetown, a character if ever there was one, and a man deeply committed to clinical education. He proudly passed on the story of the clinic's roots in the early days of the clinical movement and the aftermath of *Gideon v. Wainwright*, 372 U.S. 335 (1963), as many struggled to develop models of indigent representation. I think Bill's history was reasonably accurate, but I clearly understood from that pioneer of the clinical movement that, in his view, the small case criminal defense clinic was a grandparent among clinics. See, e.g., George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162 (1974) (describing the development of clinical education, including post-1960's "service model" clinics that prioritized legal help for the poor over students' education; "law reform" clinics where students assisted faculty litigators working on major cases; "participant-observer" clinics where students were assigned to various public and private organizations in order to conduct empirical research on the day-to-day functioning of the law; and "teaching model" attempts, where students handled select cases, under close supervision, to "develop models of problem-solving and decision-making in the performance of lawyer tasks").

tant activity, our work with our client raises many strong feelings and provides rich opportunities to experience and work through emotionally loaded moments.

There is, of course, also a very important analytic component to lawyering. Our small case model offers wonderful opportunities to develop and sharpen our habit of careful analysis. Our cases provide hard but manageable legal puzzles whose solutions are usually well understood by the supervising faculty and make a difference to our clients' lives. For many students, these purposive little puzzles shape their legal reasoning in the clinic and distinguish their clinical experience from the seemingly endless and sometimes amorphous disputation that frustrates some in the law school classroom.

Because we are teaching and learning centered, rather than focused on service provision, our clinic carries a small docket with a narrow focus. Although this optimizes our students' development in many dimensions, it sacrifices modeling and teaching about the goal of providing broader access to justice for all.

Yet criminal defense work offers wonderful opportunities to experience both the power and the limits of the law. Defending the accused and powerless opens students to critical analysis more easily than taking the side of the powerful or clearly righteous. Very few doubt that it is right to provide lawyers to those accused of criminal conduct but most agree that it is, at best, a morally complex activity. There is also a real, deep virtue in defending the sinner and seeking out the humanity that is to be found in each person, regardless of his or her conduct or station.

Working in a high volume urban court is also a wonderful way to help law students think about race, class and justice. There is no escaping the demographic reality of the courthouse in which we practice. Most of the defendants are poor people of color. There is also no escaping the many meanings that reasonably flow from those facts.

Becoming a good lawyer—someone who practices the craft with technical proficiency, emotional insight and morality—is a complex and difficult project. The clinic's piece of that project most squarely involves offering a structured set of experiences in which our students can develop the right habits. Although I have had many interesting conversations with my students about deep moral questions and complicated emotional issues, I do not aim to systematically analyze morality or psychology with them. My students would benefit as much from reading Thomas Aquinas or Sigmund Freud at this stage in their development as they will from spending some time during the clinic thinking about how reading philosophy or psychology could make an important difference to a lawyer. The intellectual, moral and psycho-

logical dimensions of lawyering that interest me flow from a deeply contextualized and informed understanding of the very hard questions lawyers face everyday, but all too often do not see. Too much philosophy or other abstract thinking, too early on, seduces too many of us to adopt broad, abstract and rigid answers to very particular, situated and subtle questions.

This essay focuses more on concrete suggestions about how supervisors can help students develop their analytic and technical skills than about how we can help students develop as moral and emotionally insightful professionals because, in our clinic, we most directly address the analytic and technical aspects of lawyering. I understand a bit about how we help our students develop morally and emotionally, but that is a harder project that must be handled with much greater subtlety. For example, my struggle to sensitize my students to issues of race, justice, judgment and ethics in the clinic classroom yielded mixed success. These days I am much more likely to let the work speak to them about these issues. Once students have been to 100 Centre Street a few times, they want to talk about race and justice. After they have tried to negotiate with a very busy prosecutor or counseled a real client, they are usually pretty interested in exploring issues of ethics, strategic judgment and lawyer role. If we have sparked genuine interest in the hardest issues—the big questions of morality and purpose—I think we have laid a good foundation and can leave it to our students to explore those issues for a lifetime.

### I. LIVE CLIENT - IT'S ABOUT THE CLIENT

The most significant structural element in our clinic design is the choice to present our students with real clients—people who have actual legal problems.<sup>10</sup> This is the heart of what is commonly known in clinical legal education as a live client clinic. This model is most often distinguished from the clinical teaching format that uses simulated

---

<sup>10</sup> I have divided the world of experiential legal learning into real matter and simulation based settings and glossed over the distinction between in-house clinics and externship programs. Externship programs can provide students with varying levels of responsibility for actual legal matters. See Brock K. Baker, *Learning to Fish, Fishing to Learn: Guided Participation in the Ecology of Practice*, 6 CLIN. L. REV. 1 (1999) (describing “participatory and lateral sources of learning that challenge and supplement the clinical model”); Robert F. Seibel & Linda H. Morton, *Field Placement Programs: Practices, Problems and Possibilities*, 2 CLIN. L. REV. 413 (1996) (arguing that externships offer benefits unavailable through in-house clinics). Another taxonomy, more suited to capturing the varying supervisory model, divides this world into in-house live client clinics, externship programs, and simulation classes. See Elliot S. Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships and Simulations*, 51 J. LEGAL EDUC. 375 (2001) (offering an authoritative description of clinical legal education).

matters or cases.<sup>11</sup> There are, of course, many clinics that have no clients but still present students with real legal problems that have consequences for others, such as where students act as mediators or court evaluators, among other roles.<sup>12</sup> Another term, such as "actual matter clinic," might better reflect the great diversity of clinics, including those that are not representational and those that work on matters rather than cases, including many transactional clinics that have developed in recent years. In all of these settings, law students take responsibility for real legal problems that have consequences for third parties. Responsibility for third parties is the key to the unique opportunities our clinic presents for our students' emotional and moral development.

Many of my students come to law school with significant life experience and most of them are responsible, caring and thoughtful people. But most have been students for much of their lives and all have been law students for at least one year. Being a student has an irreducible element of narcissism. Students focus on changing themselves. If law students do not do their reading or go to class, they may suffer and their suffering may cause pain to their loved ones, but there will be no direct injury to a third party. But if my clinic students do not take their clinic work seriously, a client could suffer real harm.

Taking on responsibility for others, as a professional, is thus the key to my students' moral and emotional development. Although theorizing about having responsibility for another and navigating the authority that comes with professional expertise are valuable endeavors, the actual experience usually involves some surprises. For example, it is very hard for many of us to take on appropriately robust responsibility for a client's legal matters without a disabling dose of negative judgment, emotional blowback, or paternalism. In other words, many of us must work through our judgmental reactions toward our clients, our own emotional reactions to exercising authority, and/or the desire many of us feel to tell our clients how to improve their often difficult lives before we can focus on our clients and their legal problems. Most of us cannot predict how we will respond to this new kind of

---

<sup>11</sup> For a very convincing analysis of the virtues of simulation, see David A. Binder, et al., *DEPOSITION QUESTIONING STRATEGIES AND TECHNIQUES* (2001). I developed and taught a simulation based course and simulation plays an important role in our criminal defense clinic. See Ian Weinstein, *Testing Multiple Intelligences: Comparing Evaluation by Simulation and Written Exam*, 8 CLIN. L. REV. 247 (2001) (using Howard Gardner's multiple intelligences theory to explain differences in students' grades in a course that combined simulations and a written final exam and arguing that simulations test an independent set of important lawyering abilities and are a useful addition to law school testing).

<sup>12</sup> James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLIN. L. REV. 457 (1996) (describing a mediation clinic and arguing that putting students in the role of the neutral gives a powerful critical perspective on the law).



relationship. We need to experience it and see how we react. Those reactions are very valuable to us, if we can make good use of them.

That is where reflection on relationships comes in. Once my students have a real life experience, my task is to help them name and describe their reactions to clients as well as colleagues, adversaries, judges, court personnel and others. I often tell my students that these interactions are deceptive. They look and feel like the relationships they have long experienced; however, the relationships are different because they are professional. I do not say exactly how they are different, but most of my students understand that they are constructing a new identity for themselves—one related to their ordinary selves, but distinctively professional. Constructing that new identity requires us to develop a new set of emotional responses. Theory can help prepare us, but only experience can give us the opportunity to develop the emotional habits and situated emotional knowledge that will guide us through the complex moment to moment reality of practicing our craft.

Clinical work with clients also offers a powerful opportunity to experience and understand the moral dimensions of lawyering. As a theoretical matter, many of my students agree that morality demands that we respect our clients and treat them as we ourselves would want to be treated. Although some may be thoroughgoing and self-aware instrumentalists, most students sympathize with a Kantian formulation based on universal principles that direct us to treat others as ends in themselves, not merely as means to fulfill our own desires.<sup>13</sup> But as with our emotional reactions to clients, we are not always so good at predicting how these basic moral demands will play out in our actual practice. Live client clinics place us in relationships with autonomous others, who are intrinsically entitled to respect and regard, thereby giving us a laboratory for moral action. We make good use of that laboratory when we reflect upon the moral aspect of our work in the clinic.

Treating others with respect<sup>14</sup> is a very basic moral act, yet we often overlook it or take it as a given. Many of us are so caught up in our self-involved dash through the academic semester that we lose sight of how important it is to treat others as ends in themselves, not

---

<sup>13</sup> See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (1785).

<sup>14</sup> Abbe Smith, an experienced clinician, has written powerfully on the ethics of criminal defense lawyering. See Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203 (2004) (arguing that defenders in high-volume urban settings who approach the work out of respect for their client, pride in craft, and a sense of outrage about inequality, injustice, and routine abuse of power can sustain their careers despite systemic incentives to fail).

just means to getting through our schedules and accomplishing our goals. In our clinical work, we have the chance to live and reflect upon our values as we interact with people who are naturally ends in themselves and not just means to educate our students and do our jobs. Although we will speculate at length about how to treat our clients as we plan and analyze our casework, in the end we all learn what it means to respect each other as we do our work. The answers are rarely obvious or simple. Sometimes we respect others by just listening and sometimes we respect others by confronting and pushing. It is a deeply contextual and complex matter.

Because respect is a central and complex aspect of successful lawyering, it is worthy of considerable reflection. Dealing with real people provides infinite grist for that mill. We need not speculate on how some hypothetical person might act, decide or feel in a given situation; we experience a particular person together. Although there are many uncertainties and barriers to fully understanding all the other people with whom we interact, at least we have a particular instantiation of the human condition upon which we can all focus.

With these ideas in mind, my colleagues and I endeavor to respectfully understand our clients at the very start of our clinic, in the hope of setting a theme for the experience. Therefore, even in this live client clinic, we begin with a simulation. As anxious as we are for our students to start their real work, we want to send the message that lawyering requires skill and preparation.

In our first seminar meeting with our clinic students during the first week of classes we simulate a client interview. Our theme is that beginning to understand our clients through a brief cellblock interview before arraignment requires large doses of preparation, curiosity and respect. For this first class, an actor plays the client. In this way, the students tend to see this simulation as more "real" in the sense that it involves a person from outside the law school. One of us does the interview and we try to convey the respect, concern and expertise that we each hope, as experienced defense lawyers, to bring to every client interaction. We let the simulation run for perhaps ten minutes and plant a suggestion of a mental health issue in the midst of a first interview of a client facing a misdemeanor charge and who is likely to be released. Once the actor steps out, we divide the students into groups of three or four and ask them to identify the client's primary need and suggest three ways to address that need. Each semester we have a different version of a fruitful discussion in which at least one, and usually several, students express some doubt or skepticism about something the client has told us. For me, those are key comments in this first discussion.

As we discuss the simulation, students will usually raise the way the client talked about his mental health history. I listen for the form of that comment. Sometimes a student will say, "I think he is a liar. Did you hear the way he talked about his psychiatric medication?" Another formulation might be, "He lied to you about his mental health picture," while a third way of expressing the idea would be, "I don't think we heard the whole story about his medication." In my mind, the first two ways of framing the thought suggests that the speaker, like so many of us, is experiencing an emotional reaction to the client and treating him or her as a means to the student's goals, rather than as an end in himself or herself.

Essentializing the client as a liar is a good strategy for quickly relieving oneself of the difficulty of dealing with people who do both good and bad things and resist generalization. It can serve many useful immediate emotional purposes, but it does not promote good lawyering, in either the moral or instrumentalist sense. Focusing on the client's breach of faith to the lawyer, in highlighting that the lie was "to you," is perhaps the easiest to see in the light of my claim that students are naturally narcissists. I think it is very important to help students get past their initial reaction that the client is lying, or not giving precise answers because of the client's feelings about the lawyer.

It is essential that young professionals recognize that for the majority of clients, most, if not all of their behavior toward the lawyer has nothing to do with the lawyer, particularly if the lawyer is reasonably skillful in their professional role. Rather, clients' behavior has everything to do with what the client brings to the situation. Of course students must be alert to the possibility that there is an issue influenced by their behavior, but that is often the best case, as that is something the student lawyer can control. So right from the very start, we look for opportunities to discuss what the students saw and heard that makes them think the client may not be telling the truth and why that might be happening. We aim for a discussion that offers a range of possible reasons and also includes some analysis of why the explanations could make a difference in how we proceed and what that analysis tells us about how we should identify and prioritize our next steps. In other words, I hope for a discussion that stays focused on our client and what he or she needs from his or her lawyer. While I think it quite important to recognize the feelings the student may have about the interaction, my purpose in discussing their feelings is to help them recognize the many ways our emotions pull us away from focusing on our clients, not to analyze and adjust my students' feelings.

This first discussion about a client's motivations and purposes

usually moves in a cycle we will repeat many times during the semester. Once my students have real clients, they will experience both timely and untimely clients, clients who offer complete and credible stories and those who offer very imperfect answers in imperfect interviews. Each semester I have conversations that move from a description of the interaction, to an analysis of the range of explanations, then on to an examination of how and why the different explanations may send us down different lawyering paths. I end with discussion of how each of us feels about the interaction under discussion, and the discussion itself.

Our conversations are rich and serious because each client presents his or her own complex reality and each client is a person, an end unto themselves. Of course it is not just the clients who are ends in themselves—so are the students, teachers, adversaries, and judges. I cannot teach a formula for practicing law with respect for all the other participants in the process. However, we have developed a shared experience that helps our students explore what practicing law with respect for others means to them so that they can begin to develop the tools they need to realize that goal. It starts, as I approach it, from the realization that my representation of a client is about my client, who gives me the privilege of exercising a bit of real authority in the world on his or her behalf and for his or her purposes.

## II. SMALL CASE - THE RIGHT SIZED BITES

My students represent people charged with violations and misdemeanors.<sup>15</sup> Although these cases are important matters for our clients, they involve the least serious charges in our criminal law and are resolved in a highly bureaucratized system of mass case processing.<sup>16</sup> Much as we work to make our clients stand out as individuals with particular stories to tell, our cases move through the system in a predictable way, presenting different versions of a relatively limited set of

---

<sup>15</sup> Violations are non-criminal offenses, while misdemeanors carry the stigma of explicit criminality. See N.Y. PENAL LAW § 10.00 (Consol. 2003) (defining violation, offense, and misdemeanor in New York law). Although denominated non-criminal, violations carry the burden of an arrest, require defendants to appear personally in court, and can trigger significant collateral consequences.

<sup>16</sup> For the classic discussion of the adjudication of minor offenses in America, see MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN LOWER CRIMINAL COURT* 5 (1992) (analyzing how and why minor cases are processed, rather than adjudicated). I have described the particular way minor cases are processed in the New York County Criminal Court in Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 *FORDHAM URBAN L.J.* 1157 (2004) (arguing that structural features of the system for adjudicating minor offenses make it difficult to resolve these cases on the merits or use them to check the authority of police and prosecutors and suggesting procedural changes to improve the system).

substantive and procedural problems. That relatively small universe of problems enables most of my students to learn enough in the course of a one semester clinic to begin to develop real expertise in this corner of criminal defense work. In this section I describe how my students develop that expertise and suggest why it matters.

At the beginning of this essay, I described the high point of my clinic semester as the moment when I find myself watching my students behaving as lawyers in the courtroom. The confidence and purposefulness with which they carry themselves marks their movement from novices, who slowly and carefully pick their way through terrain they cannot read, to experts, who can read the trail and move swiftly.<sup>17</sup> The distinction between novices and experts and the related notion that clinical education has a special role to play in helping law students become experts at lawyering, have proven fruitful in clinical theory. Although there are some healthy differences in emphasis, most agree that law students need to learn two kinds of knowledge:<sup>18</sup> the substance of the law and what to do with it. These two kinds of knowledge may be called explicit and implicit knowledge, domain and tacit knowledge, or somewhat confusingly for lawyers, substantive and procedural knowledge.<sup>19</sup>

Experts have acquired both explicit and implicit knowledge within their domain of expertise. As expertise develops, domain specific explicit knowledge is organized to take greatest advantage of domain specific implicit knowledge. In other words, a lawyer with expertise in criminal defense work does not just have greater knowledge about bail applications. His or her knowledge about bail is also organized so that he or she can quickly and accurately plan and make a persuasive bail application. That lawyer has developed a cognitive script or schema for bail applications.

One virtue of working on these small, predictable cases is that they require a relatively small set of simple schema. We have identi-

---

<sup>17</sup> Experts are able to solve problems in their area of expertise, or domain, much faster, more accurately and with much less conscious cognitive effort than novices. See Blasi, *supra* note 4, at 328 n.32 (explaining and applying the novice expert distinction to lawyering).

<sup>18</sup> See Mark Neil Aaronson & Stefan H. Krieger, *Teaching Problem-Solving Lawyering: An Exchange of Ideas*, 11 CLIN. L. REV. 485 (2005) (providing an exchange of ideas between Stefan Krieger, who stressed the foundational importance for law students of acquiring substantive legal knowledge, and Mark Aaronson, who articulated as a teaching goal helping students develop the ability to think critically and appropriately in their role as a lawyer).

<sup>19</sup> See Stefan H. Krieger, *Domain Knowledge and Teaching of Creative Legal Problem Solving*, 11 CLIN. L. REV. 149 (2004) (discussing the cognitive science research on the roles of domain and tacit knowledge in problem solving and arguing that clinical legal education has tended to incorrectly downplay the importance of substantive law in the acquisition of legal problem solving skills).

fied a modest field of explicit knowledge and an even more limited field of implicit knowledge that can be gained in a semester and appears to advance almost all of our students to a reasonable degree of expertise in this subdomain. This expertise empowers our students by giving them concrete experience with what becoming an expert feels like and requires. Many report, as was my own experience as a clinic student, that the first experience with lawyerly expertise remains an important professional benchmark.

I have come to understand that the cases in our clinic can usefully be divided in three stages for teaching purposes. First, we meet our clients and learn about their situations. This stage corresponds to the arraignment and investigation phase. Our students' primary concern in this phase is fact development—developing a rich understanding of our client and the events relevant to the criminal case and its resolution. Our primary pedagogical goal in this phase is helping the students develop a model for using the law to guide factual development. We use the initial interview, bail argument at arraignment and planning for fact investigation to teach this unit.

Once we have developed a well grounded understanding of the facts, we move on to the second phase, which focuses on strategic analysis and planning. In this stage, we aim to help our students develop schema that will enable them to identify appropriate goals for the case and make strategic choices consistent with those goals. The centerpiece of this section of the class is our class on decision tree analysis.

The third phase of the class focuses on using the litigation process to execute our strategic vision. Our pedagogical goal in this section is to help our students learn to litigate their chosen strategy. This stage typically involves drafting pre-trial motions, negotiating possible dispositions, assisting clients with matters outside the litigation, trial preparation, and resolution of the case.

Each of these stages is complex enough to offer a wonderful learning opportunity, but simple enough so that almost all of our students are able to develop useful cognitive models, or schema, during each of the three phases of the semester. The factual investigation of a simple assault or marijuana possession case, for example, is complex enough but not too complex. It requires detailed client interviewing, one or more trips to the scene, interviews of one or more witnesses, reviews of records and other evidence, and background research.

A thorough investigation of this sort of case can be completed in a week or so. It is quite different from the investigations I used to supervise when my students worked on federal felony cases. The investigation of a narcotics conspiracy case can require hundreds of

hours of review of audio tapes and transcripts, trips to multiple scenes, many hours of interviews, and a host of other time intensive tasks. Students can gain tremendous insights from working on complex cases, but the docket must be managed carefully to give students an opportunity to see and appreciate the larger context. Our format makes it easier for our students to see the process in its individual parts and as a whole.

*A. Phase One: A Contextualized Understanding of Our Client*

The methodological “whole” we want our students to see in the first phase of our clinic is the reciprocal relationship between fact and law. The schema we want them to build is one in which the facts of the case shape the questions we ask about the law and the law shapes the facts we seek and how we interpret them. This process will lead our students to the kind of deep and contextualized understanding of their client’s situation that leads to creative problem definition and problem solving.

For us, this process begins with the first simulated interview described above. Before the simulation, we distribute the complaint filed in the simulated case. During our discussion of the simulation, we reference how the interview is shaped by the language of the criminal statute (factual details about the incident), the procedural posture of the case (lawyer’s description of what is likely to happen next), and the law of bail (details of the client’s background and current situation).

We are careful to remind our students, and ourselves, that the client and his or her particular situation are the central facts in any case. We try to model reading the law in ways that make the case about this unique individual, rather than reading the law to standardize the client. Thus, the factual details of the incident should reveal what this particular person did, said, thought and felt, rather than confirming our assumptions about how drugs are handled on the street. What happens next in the case has to be viewed in the light of what our client wants and needs, not in the light of what ‘usually happens’ in this sort of case. The examples go on, and the theme must be kept front and center all semester. After all, as I argued in the first section, it is this unique person before us and his or her consent to our playing a role in this important matter that drives the live client clinical experience.

As the semester moves through the first five or six weeks, in which the students simulate initial client interviews and arraignment and then do their first live client arraignments and initial investigations of those first cases, we reinforce the reciprocal relationship be-

tween law and fact. Bail argument simulations offer one of the many wonderful opportunities to illustrate this point. Students will typically have read a great deal about bail and have an abstract understanding that the judge is deciding whether or not the person is likely to return to court. But they have not usually thought concretely about how the law points to particular categories of facts that are always relevant for bail.<sup>20</sup> A bail argument offers a clear example of how we can use the law to structure a factual argument.

Another wonderful thing about bail arguments is that while the structure of the argument can be taken right from the statute, the content of the argument varies widely and is always individualized to reflect the particular, concrete situation we have just learned about from our interview with our client. Bail arguments are also a wonderful example of how structure can free us to think creatively, rather than tying us down. The law tells us the categories that are relevant, and one of the lawyering challenges is making the argument persuasive by individualizing our client and using evocative, concrete and positive language. We try to remind our students that detailed attention to the law is the starting point for creative lawyering, not a substitute or hindrance to creativity.

In our cases, bail arguments are good teaching and learning tools because they are small in scope, controlled by a detailed statute, based on rich facts to which we usually have very good access (our clients know a good deal about themselves), well understood by the teachers, and can make a real difference in our cases.<sup>21</sup> My students and I can simulate, critique and try a number of bail arguments in the course of a class or out in the hallway in the courthouse. The arguments are typically brief, lasting one to three minutes and including roughly three points: strong community ties, weak prosecution case, and minimal prior court history are typical. These arguments can be polished into shining little gems which can motivate, serve as models and make a real difference to our clients.

Our focus on the interrelationship of fact and law continues as we move to the charging statute to orient our investigation. As with bail arguments, we urge our students to attend closely to the language of the statute as a means of sparking creative legal and factual argu-

---

<sup>20</sup> The New York Statute, like many bail statutes, is quite specific. *See* N.Y. Crim. Proc. Law §510.30 (McKinney 1995).

<sup>21</sup> In our cases, bail arguments have little downside. Most of our clients will be released, sometimes with consent and without argument, but more often after argument and against token opposition. Those clients with significant prior records, pending cases, or bench warrant histories and are in real danger of having bail set can almost never be hurt by a good argument. Indeed, it is not uncommon for judges to release folks with problematic pasts when a good bail argument is offered.



ments. Here again, I think the relative simplicity of the statutes and the facts makes it much easier for students to master the substance and move on to see the entire problem and think about it creatively. From a cognitive perspective, these simpler problems have fewer moving parts and tend to deal with familiar core issues of criminal law: intent and the scope of the act. Because the research universe is limited, our students are able to gain, or reinforce, a fairly complete version of the relevant explicit knowledge they will need in a relatively quick amount of time. This gives our students, and us, a firm foundation for, and more opportunity to focus on and develop, the relevant implicit knowledge that enables us to see the problems as a whole and think creatively about them.

The relative simplicity of the legal problems also has an affective payoff in encouraging our students' development as problem solvers. Most of my students take their responsibilities very seriously. Many of them are so anxious about the responsibility they have taken on that they seek refuge in claims that they do not know enough about or cannot properly analyze with respect to the problem at hand. In the course of working with these small scale problems and cases, reality can test those feelings in a pretty straightforward and useful way. My students get better results than they expect with some regularity and that motivates them to be good, tenacious lawyers.

Of course there are downsides to working on these small legal questions. They do not offer opportunities to explore strategies for dealing with the many very complex, much more open-ended problems that students will encounter in practice. Nor do they help students develop sophisticated research skills or open them to non-legal modes of analysis. I believe, however, that these problems model a central and transferable lawyering skill: creative problem definition and solving that proceeds from a deep and contextualized understanding of the core facts of the problem, which define the core law relevant to the problem.

### *B. Phase Two: Strategic Analysis and Planning*

After we have developed a useful understanding of our clients' problems and the potential solutions we might pursue, we are ready to choose among those solutions. In our practice, as in any criminal defense practice, evaluating the plea offer is central to charting a strategic course. Thus, evaluation of plea offers is the central vehicle for strategic analysis in our cases. Here, we can extract a central message and spend a good deal of our time charting the structure of our analysis because we three supervisors share a well developed understanding of our problem and its solution. As in many other high volume urban

practices, the emphasis on case processing results in a system in which the process is the punishment. In our courthouse, rejecting the plea offer in a misdemeanor case and returning to court will almost always reduce the likely legal sanction but increase the personal costs to the defendant. The classic tradeoff in these cases is whether the defendant is willing to return to court repeatedly over the course of six to twelve months to get a dismissal or non criminal resolution with no—or very minor—consequences.

This strategic picture will make intuitive sense to those who have practice experience in a high volume urban court hearing minor cases, but is quite surprising, although demonstrably true, to our students. This second phase of our clinic work offers the chance to focus on two central issues in strategic analysis: how to do it and what to do with the results. Our central themes are that we must carefully analyze the likely outcomes of each of the legal choices available and we must also very carefully consider how those outcomes relate to our clients' goals in the world. Many of our students become strongly motivated to think hard about strategy because they begin the semester thinking that the prosecutors' plea offers are generally good deals and seeing many defendants, represented by experienced lawyers, take those offers. By the end of the semester, our students usually realize that careful analysis demonstrates that their intuitive sense about the deals was not accurate and that they are able to offer better advice and get better results after more rigorous strategic analysis.<sup>22</sup>

Our class on evaluating plea offers comes around the fifth week of the semester, after we have started picking up new cases, while our students are investigating their cases. We begin with a brief introduction in which we suggest that client counseling has to combine objective, or case comparative, analysis with subjective, or client specific, analysis. That is, we analyze the options before us to understand the likelihood and full consequences of each option. Once we understand the range of options, we relate them to our client's particular goals and situation. A given outcome is only good or bad for a particular client, but we must fully understand the choices before we begin to ask whether each choice makes sense for a given client.

After that introduction, a team of students introduces a new client and describes his or her case. They either report upon, or we hypothesize, a plea offer. Then we ask the students: Is the plea offer a good offer or a bad offer, and compared to what? Often one of the first responses is that they do not know if the offer is good or bad. In turn, we are asked how this offer compares to the offer in similar

---

<sup>22</sup> We are really benefitting from a significant market inefficiency.

cases. We then probe the students as to why they care whether the offer is similar to other offers and suggest that we should be more ambitious for our clients and ourselves at this stage.<sup>23</sup> We introduce the idea that a more useful frame of reference is to compare the plea offer to the discounted value of the charge. In other words, how likely is it that the prosecution will be able to secure a conviction on the charge? What would happen in the event of conviction? How likely are a range of other outcomes? From these suggestions, we introduce decision tree analysis and chart out the possible actions we might take at each node of the decision tree, the possible results, and the likelihood that the case will take that particular path.

We have found decision tree analysis a rich teaching tool for several reasons. First, it illustrates the importance of understanding the strategic context in which one is lawyering. Because we work in an environment in which prosecutors are overwhelmed by their caseloads and many cases are dismissed for violation of the speedy trial statute, detailed knowledge of that statute is crucial and pays large dividends in our setting. Second, it graphically reminds us that no decision is costless. This lesson is brought home as we draw arrows and assign the probabilities that a client will fail to appear after we reject a plea offer and set another court date. It is also reinforced as we focus on listing the full set of consequences of conviction. We see that continued litigation offers a 10% chance of conviction on a charge that would result in deportation and a 90% chance of outright dismissal. In comparison, acceptance of the offer to have the case adjourned for one year in contemplation of dismissal if there is no other contact with the system for a year leads to a 100% chance that the case will remain open for a year, a 20% chance of having the case restored to the docket with, ultimately, a two percent chance of a result that would lead to deportation. This comparison presents a choice that only our client can resolve. Perhaps most important, the complicated, messy structure on the chalkboard reminds us that even our little cases present a complex, tangled set of options with many uncertainties and choices. The decision tree should make us reflective and careful not to reach snap judgments.

I also like the decision tree class because it captures and formalizes so much of what I have always done in analyzing and comparing different courses of action in a criminal case. So much of the work is thinking through the trade offs in certainty and sanctions that are at the heart of plea bargaining. So much of the lawyerly judgment is

---

<sup>23</sup> We note that some clients may feel that a fair result means they are treated about as well as others, but that is a question for later in the process, when we can present a range of options to our client and relate the different paths and outcomes to the client's goals.

assigning probability at each node and coming up with more complete lists of possible actions and their consequences. In this dimension, our simple clinic does not offer anything all that special as compared to other litigation clinics. So many cases can and should be modeled in this way, not to find the right answer on our own, but to provide correct information that we can present to our clients as we work with them to come up with the right answer. Our cases have the advantage of being easier for beginners to model.

We have taken particular advantage of this analysis by focusing it on the phase of our cases in which it most often makes a very positive difference for our clients. The answer that flows from this analysis in class is always that the plea offer, which often looks good when viewed in isolation, is significantly less attractive when compared to the discounted value of the charge. Although we choose the class example with that result in mind, that is almost always the answer in our cases, so it is a point to which we return time and again. When I was involved in a federal felony practice, the keys points were quite different. In most cases, the crucial moments were the very early decision whether or not to cooperate with the government in the investigation of others and plea discussions with an eye toward sentencing litigation.<sup>24</sup> Were I still supervising those cases, I expect I would use one of those two decisions for my decision tree class because in my experience, those are likely to be the two areas in which careful analysis will most often reveal possibilities for the lawyer to make a difference in ways that are not obvious to the inexperienced.

In the end, the decision tree helps us engage in more rigorous and thorough strategic planning. We also warn our students, and remind ourselves, that it can lend a false air of mathematical certainty to the enterprise, tempting us to forget that we have merely charted out our best judgments in a formal manner. Still, it gives us a common way to think and talk about our strategy for a given case. I have found this common ground to be especially useful in helping students connect their litigation tactics to their strategy as the case progresses.

### C. Phase Three: Executing Our Strategic Vision

The third phase of our clinic seminar includes pretrial motions and dispositional advocacy,<sup>25</sup> the core of the criminal litigation in

---

<sup>24</sup> As a federal practitioner, I thought a good deal about snitching, see Ian Weinstein, *Regulating the Market For Snitches*, 47 BUFF. L. REV. 563 (1999), and sentencing, see Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87 (2003).

<sup>25</sup> We also do work around client counseling, visit a community based public defender office, focus one seminar class on difference, and offer one class on material the students

which we usually engage. In this section of the course we aim to use the students' developing understanding of the fact/law connection and strategic thinking to help them plan and execute effective tactical moves in litigation. If we come to understand our client, the facts of the case and the governing law, we can develop and prioritize a useful set of strategic approaches with our client. Once that strategic plan has been developed, we can then focus our litigation tactics on carrying out that plan. I have learned that some students need prompting to see that connection.

As we conceive the tactical dimension of litigation, it has two components. First we must be clear on how to execute a given tactic, which might be a motion, an episode of advocacy to a judge or adversary or a trial. We pay special attention to motions and dispositional advocacy because those moments play an important strategic role in many of our cases. The governing law on pretrial motions offers a wonderful vehicle for exploring pleading burdens, while dispositional advocacy offers a wonderful moment to reinforce the relationship between strategy and tactics.

Our students learn about motion practice by meeting as a team and writing a memo discussing whether and how they would draft a pretrial suppression in one of their cases. These memos, and the class in which we review the memos in small groups, give us the opportunity to focus on the mechanics of New York Criminal Procedure law. The relevant statutes can be a little hard to understand the first time through, but they lay out distinct pleading burdens for different types of motions, automatically granting a hearing in some cases but requiring threshold factual pleadings in others. This class reinforces central messages about the interconnection of fact and law and the importance of paying close attention to the governing law that were apparent in our early classes on bail and charging instruments. Our work on motions reminds us that if we want the judge to grant a hearing on our pretrial motions, we must understand the law governing that decision and tailor our factual presentation to the relevant law.

Our motions class also addresses the relationship between tactics and strategy. We ask our students why we file motions and what we hope to accomplish by filing motions. Students reasonably answer that we want to obtain the relief sought, typically suppression of evidence. Discussion of the relevant statutes and the students' experiences in a variety of criminal law settings helps everyone recognize that although suppression would be great for our clients, it is quite rare. First, we separate the pleading burden we must carry to get a

hearing from the prosecutor's burden of persuasion necessary to overcome our allegation of unconstitutional police conduct. Then we turn to the hearing itself and ask how often judges disbelieve police officers in the absence of strong counterproof. In our practice, under New York law, hearings are frequently granted, very rarely held, and much more rarely won by the defense.

The logical next step in the discussion is to ask: So why do we make suppression motions? There are at least two reasons. First, occasionally a case will actually go to trial. If it does, a motions hearing will give us the opportunity to develop testimony under oath. That testimony will provide valuable discovery and offer the chance to develop impeachment material. Second, in the majority of cases where the prosecutor cannot adequately prepare for trial, responding to motions and announcing our readiness for the hearing present additional hurdles for the prosecutor to overcome.

After motion practice, we turn to dispositional advocacy, which is our version of plea negotiation. Our larger goal is to encourage our students to formulate proposed dispositions that best realize our client's goals in a particular case. We are careful about the nomenclature because we want our students to think beyond the guilty plea that is assumed in plea bargaining and consider other ways of resolving each case. We encourage our students to seek dismissals, adjournments in contemplation of dismissal, and other resolutions that differ from the common plea to a slightly reduced charge. We encourage them to consider mediation, client participation in programs outside the criminal justice system, and other individual ways of addressing their clients' situations. We then simulate negotiations with the prosecutor over those proposed dispositions.

I often play the role of prosecutor in these simulations. Self-indulgence is generally not useful in teaching, but in this simulation I often release my cranky and sarcastic inner lawyer. The students begin to tell me how weak my case is and I tell them I will see them in court. Or they begin to ask for a very favorable resolution and I flatly refuse before they finish their argument. Sometimes they persist and get me to listen. But often we break the simulation, analyze the beginning and they restart and get past my difficult initial reaction. In my mind, the key to this exercise is for them to see past the surface reactions and stick to their strategy. In other words, this simulation continues the theme of executing strategy.

Often, the first thing we discuss when we analyze the simulation is whether the prosecutor's initial rejection of their position is a good result or a bad result. The students always feel that they have failed and that the result is a bad one. I never agree with that analysis. I

remind them that they crafted a proposed resolution that makes sense in the case and is therefore a tactically reasonable position. I also remind them that, as a matter of negotiation theory, extreme positions tend to lead to extreme results. That is quite true in our practice, where prosecutors who take extreme positions, such as refusing to negotiate and threatening trial, often must dismiss cases, or have judges reject their more extreme sentencing requests. I remind students that the unreasonable adversary often suffers the bigger fall if we have correctly analyzed the situation and are taking the correct position in our negotiation.

Hoping that I have reinforced the message about strategic analysis, we usually go on to discuss negotiation tactics. We discuss the prosecutor's likely perspective on the negotiation and the students' initial visceral reaction to my rather unpleasant tone. Having agreed that prosecutorial unreceptiveness to creative dispositions is not unheard of, we brainstorm about how to begin the negotiation so as to minimize my negativity and get me to hear them out. Typically, the second negotiation proceeds much better than the first. I am still cranky, but the students are more confident in their position, less reactive to my tone, and more focused on their goals.

In sum, I have described how we use our small cases, which we understand pretty deeply as lawyers and teachers, to develop our students' expertise in litigating violations and misdemeanors in New York. We first focus them on law and fact, move on to develop strategic vision for the particular client and case, and then help them plan and execute tactics that will realize their client's goals.

### III. A TEACHING AND LEARNING CENTERED CLINIC IN THE MODEL LITIGATION TRADITION

Like many other clinicians, my colleagues and I are frequently tempted to take on new matters and expand our docket. I am always a staunch advocate of refusing new work. I resist the call to serve more clients and remain focused on our teaching and learning mission. My colleagues sometimes persuade me and sometimes wisely ignore me, but I have become a model case clinician, intent on using our little, familiar cases to help each and every one of my students become the most technically proficient, moral, and happy lawyer they can be. I see myself as a teacher first and a lawyer second. Of course the lawyering I want to teach puts clients first; we never sacrifice a client's interest in any fashion, but I am willing to sacrifice the larger interests of the community for the sake of the teaching. We strictly limit the number and types of cases on our docket and we place little emphasis on the goal of meeting the needs of the many underserved people in

America. We plug away at our small docket of little cases, lawyering those little puppies as hard as we can.

Among the decisions I have made about clinic design, my focus on teaching and learning, rather than service, seems most contestable. The need for legal services is great, even in the criminal defense arena. Although a lawyer is provided to every criminal defendant who faces the possibility of confinement, there are many meritorious post-conviction matters that cry out for lawyers and many other valuable services a criminal defense clinic could offer. My clinic could easily find more good work, or take on bigger cases that would benefit from the resources we can bring to bear, but I limit my caseload in both number of cases and case type to help me maximize the chances that each of my students will learn and grow in significant ways.

I used to teach in a mixed civil and criminal litigation clinic. Our docket included high stakes federal criminal cases and a mix of complex civil matters. When I taught in that clinic, I litigated some big and interesting cases, but my students had a very uneven experience. Some thrived in that rich and demanding context. Those students could quickly move from case type to case type, gaining a bit from each and filling in the blanks later. But other students did not thrive. For some, there was just too much going on. I was not successful in helping them develop useful mental models or integrate all that was being thrown at them. Others found the temptation to hide behind me too great in a setting in which they worked on smaller pieces of a large ongoing matter. Some never took real responsibility for their cases, or perhaps I was never able to surrender control of those cases to my students. My students' experiences with bigger cases and a heavier docket was mixed.

I thought about what I had to offer as I reflected on whether to move to smaller cases. I concluded that I am uniquely positioned to give my students the best experience I can in their law school clinic. I weighed the marginal value in terms of legal services provided of the few additional cases my clinic could accommodate against the value of providing the best clinical experience possible to my students. Limiting our clinic to a low volume of essentially one case type has permitted us to provide a much more structured and consistent experience. Most of my students will only spend one semester as law school clinic students. I want each of them to have the time to focus on at least some of their interactions and decisions and think quite deeply about them. I feel a strong obligation to each of my students and the real test is not whether the strongest learners among them benefit from the clinic. Good students make good teachers. The most important question is whether I can reach those students who may not be such strong



learners, or those who may not have yet found their way in law school. There are other clinicians who can structure their work on more complex cases and higher volume dockets and reach all of their students, but I have found that maintaining a strong focus on teaching and learning requires me to limit both the volume and types of cases on my clinic docket.

#### IV. CRIMINAL DEFENSE

Early in my career, I tried a case before a federal judge who denied my motion for a judgment of acquittal at the close of the government's case with the comment: "The home team has done better, but the Yankees have not lost this one yet. Motion denied." I told the judge that I was a Mets fan but he was about as unimpressed with that as he was with most everything I did in that trial. I could accept that the Yankees were the team of choice in the Southern District of New York; the Mets play in the Eastern District of New York. I was, however, stung to hear the U.S. Attorneys Office called the "home team."

In the fullness of time, I have come to accept the defense lawyer's position as an outsider. We make ourselves outsiders by defending people who are accused of transgressing against society's rules and values. Our professional role places us in opposition to the community's widely shared desire to identify and punish the guilty. There are many good reasons for lawyers to take on this role, and the criticism that often comes with it, but for now I want to focus on the experience my students have as outsiders, defending those accused of wrongdoing, as they begin to practice criminal defense. For many, the experience is powerful and surprising, helping them learn about themselves, about the law, and about being lawyers.

In the first section of this essay, I wrote about the value of representing real people who are ends in themselves and should be respected and not treated merely as means. All live client work offers students that experience, but criminal defense work can pose a special problem in one respect, at least for the uninitiated. At the start of the semester, some students are quite uncertain about meeting their first client. After all, their clients are accused of committing crimes. Some clients already have criminal records. I have come to understand that many come to this work with doubts and questions. Will clients be honest with us? How much law should we explain to clients at the outset? Will clients shape their stories to try to fit the law? Will clients turn out to be "bad people," whatever that might mean? I have also come to understand that the best answers to these questions are found in the work.

Once my students meet their first clients, these concerns become

much more nuanced, or vanish. I do not mean to suggest that all of our clients are paragons of honesty and virtue, but that the actual experience of meeting a client in the cellblock behind the courtroom defies the expectations of most of my students. Although they are smart people with experience in the world, few are fully prepared for how strongly and positively they will respond to their client. The most frequent reaction they express when I review the initial interview with them in the courthouse hallway is their surprise at how much they like their client and how strongly motivated they are to fight for him or her.

That initial positive reaction can be as dangerous as their prior negative assumptions about clients. The initial warm feelings often flow from a combination of relief that their client did not strike them as an absolute monster, as they feared, and a tendency to latch onto whatever exculpatory or mitigating things the client might say, out of a need to believe that their client is a good and innocent person and so worthy of their representation. The relationships with clients will deepen over time, but I am struck by how often my students are surprised by the very positive feelings they feel at the start. I also see that trust between clients and student lawyers grows over time, even as we learn both good and bad things about our clients and their cases.

I am always delighted to share those first interviews with my students; to see them feel the happy surprise of liking someone they imagined they would not like and finding common ground with a person they imagined was completely alien to them. Although any area of practice will give us opportunities to uncover and challenge our assumptions, criminal defense work provides a particularly rich context because so many come to it with so many biases. We are all influenced by the contemporary tendency to vilify all people accused of crimes and polarize the world into innocent victims and predators. We live in a time of harsh rhetoric about crime and even harsher enforcement practices. The gap between the popular understanding and the lived experience of our criminal justice system is very fertile ground for moral reflection and growth.

Of course those initial interviews gain much of their emotional and moral power from the rather gross false assumptions many bring to them. Those biases are almost always very quickly shed; just a bit of experience destroys them. But that is not the end of the assumption and judgments we all bring to the work. The initial, often fanciful doubts are replaced by more nuanced concerns, often based in reality. I have been practicing criminal law for more than twenty years. Many of my clients have been honest with me and seemed to be about as kind and decent as most other folks I know. I have also had many

clients who lied to me and appeared meaner and more manipulative than most people. Although I think the system quite imperfect, many people who are charged with crimes have indeed broken the law and many of them have acted badly, by any reasonable definition of that term.

I think there is tremendous opportunity for moral growth when we represent people who are perceived as transgressors and, in many cases, are transgressors in fact. We can live the virtue of loving the sinner, even as we reject the sin. In my experience, and in the experience of many of my students, living that virtue is more powerful than many of us expect it to be, if we can avoid or minimize the vices of self-satisfaction and personal righteousness that so often accompany criminal defense. The work also permits us to explore how we can stand with and defend the accused, a virtue one author has perceptively discussed as fidelity,<sup>26</sup> and even offer solace to the guilty. For me, and for many of my students, our work together is an opportunity to practice and reflect upon these ideas.

In addition to giving us opportunities for the small acts of virtue that can come from entering into authentic relationships with those less favored by circumstance than ourselves, defending those accused of crimes also compels us to look at the complex mixture of good and bad that characterizes all of our moral lives. I recognize that many of my clients have engaged in conduct that crossed important social and moral lines and distinguishes them as blameworthy in the criminal law. But I also recognize the limits of, and ambiguities in, those judgments. It reminds many of us that we are all transgressors in some ways and norm abiding in others.

Viewing the law from the perspective of the trial level criminal defense lawyer, if only for a semester, also offers an important counterweight to the imperial view of the law that so many law students take away from first year. Despite my students' many critical insights about the law, they often start their semester in the clinic with the underlying assumption that the law is a logical, seamless, and apparently self-executing web. It is only natural that they should approach the law from the perspective of the appellate opinions that dominate other parts of the curriculum, including the first year criminal law course I teach.

My students' notions of how the law works expand during their time in the clinic. They see the often tenuous relationship between the law's dictates and the actions of the trial level judges before whom

---

<sup>26</sup> For a powerful discussion of how Jewish and Christian thought inform criminal defense work, see Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999).

they appear. My students see how procedure and practice can overwhelm the substantive law and how individual actors can powerfully shape outcomes, sometimes informed by the shadow of the law and sometimes in the bright glare of pure power. While clinic students can learn these lessons in any trial level setting, the criminal defense perspective is a particularly good vantage point from which to appreciate the benefits of—and the difficulties with—discretion and legal indeterminacy. Seeing the legal landscape from the perspective of individuals who are the object of state power greatly sharpens our appreciation for the traditional skepticism about centralized, unchecked power in Anglo-American law.

This vantage point also informs my students' sense of what the law is. Too many of my students, and too many people in general, start with the assumption that the law is a simple set of dictates that need only be applied in each case to achieve justice. In contrast, the practicing criminal defense lawyer sees the law as a huge complicated mass of often contradictory ideas that must be carefully sorted and very judiciously acted upon to prevent the law from completely crushing our clients. Many of my students finish the semester with a bit more humility about the law, which is a very good thing.

Criminal defense work is also a wonderful vehicle for exploring professional motivation. For most, it is not self evident what would motivate a person to defend those who have harmed others and done wrong. Criminal defense lawyers offer a variety of explanations for why they do the work. Some believe that the power of the state should be constrained and monitored, while others distrust authority and are naturally drawn to challenging the police and prosecutors. There are also those who see the work as essentially political, representing and empowering the underclass and sifting out the innocent.

I see the work as having a political cast and also believe in the monitoring function, but then I chose criminal defense as my primary practice area. Although some of my students are interested in criminal law as a practice area, typically only two or three out of 16 express a strong interest in criminal defense. Another half dozen or so express an interest in prosecution, which may lead some of them to defense work later in their careers. Perhaps it is because only half our students come to us with a strong interest in criminal law and many more become prosecutors than defense lawyers that our work offers such a rich context for reflection upon lawyerly motivation. Most students have a pretty strong reaction to the work.

There is a debate about whether future prosecutors should take defense clinics, and if they do, how they may benefit from a defense clinic. Our experience has been that future prosecutors are as zealous

as their colleagues. Many report that their defense experiences are often in their minds as they make decisions as prosecutors—but of course they are reporting back to their professor and are smart enough to know what I would like to hear. The value of a criminal defense clinic, however, extends beyond exploring lawyerly motivation, sensitizing future prosecutors, or training those with a strong interest in criminal defense, although I think we do those things.

The empirical reality of our practice is that, despite police aggression in some communities, most of our clients have violated the law. Yet each semester we have clients who are factually innocent and we have more acquittals than convictions among the few cases we have tried. Many of our students start the semester motivated by the idea of factual innocence. They are uncertain, as they should be, about how to respond when a client admits his or her guilt immediately, or when the investigation turns up stronger evidence of culpability than what the prosecution alleges. These are important moments in legal education that help a law student become a lawyer.

#### V. HIGH VOLUME URBAN SETTING - ACCEPTING THE COMPLEXITY OF CONTEMPORARY JUSTICE

Our students represent people in the New York County Criminal Court at 100 Centre Street, the courthouse through which most defendants arrested in Manhattan must pass. It is an imposing modernist courthouse, built under Franklin Delano Roosevelt, that is now quite rundown and awaits major renovation.<sup>27</sup> We first take our students to court in the third week of the semester to observe the arraignment part and see the Courthouse. They pick up cases beginning in the fourth week and return to the courthouse five to ten times during the course of our semester long clinic. Second only to spending time with their clients, giving our students an opportunity to spend time in the courthouse, experiencing how justice is done, is the most important experience we provide to them.

But providing students with the experience of time spent in that courthouse is not, by itself, sufficient to spark reflection on the quality of justice there. As I noted in the introduction, my experience with students who have spent significant time in that courthouse in a non-clinical setting suggests that just spending time there does not always deepen students' thinking on issues of justice, race, class and gender. In this section, I will explore how we give our students a mix of data, analytic tools, and emotional space that permits many of them to

---

<sup>27</sup> New York State has an ongoing, and reasonably successful, program of courthouse construction and renovation.

grapple with the dissonance they experience when they first go to court and eventually appreciate the complex reasons for the great gulf between the law's aspirations and its actual practices. My hope is that we are helping our students reach a personal understanding of these issues that can support a lifetime of concern and action.

Once I stopped trying to teach my students about race, class, and justice as a classroom topic and started taking them to a high volume urban court, our conversations about race, class and justice became much richer and more complex. The emotional power of these issues is attractive to many of us, yet also impedes my efforts to teach this material in the classroom or through less intensively supervised experiential learning. Although others manage discussion about race and justice better than I can, I have seen many students quickly take extremely defensive positions during class discussions in this area. All too often, a few students will express the view that racism is endemic in our courts. Others respond defensively, perhaps arguing that all the defendants are guilty and the judges are wise, or simply denying the existence of endemic racism and instead arguing that the presence of some white defendants shows that the system is fair and balanced. All too often, the majority of students sit on the sidelines, unsure of how to advance the conversation or unwilling to expend the energy. I have rarely succeeded in advancing the discussion past the point of rather simple, extreme positions, despite repeatedly trying with a variety of exercises and readings.

Our approach is more successful because we focus on individual clients and the legal tools our students need to represent their clients. As the students develop those relationships and skills during the first third of the clinic, their familiarity with the Criminal Court grows. The nuanced relationships they develop with their clients create both an appreciation for and an emotional space for a correspondingly nuanced view of the court. Creating space for a more nuanced view of Manhattan Criminal Court is really pretty significant, as that court triggers rather strong and extreme views in many.

Courthouses are imposing places by design, and Manhattan Criminal Court makes a particularly big impression on most people. It is a Dickensian swirl of classic New York characters rushing about a run-down, poorly lit, once grand building, now filled with oddly shaped rooms, mysterious unmarked doors and constant piecemeal renovation that never seems to improve the place much. For many of my students, it is the dirtiest, noisiest, most tumultuous place they have ever been inside. For most of the white students, it is one of the few places in which they are clearly in the numerical minority, although once they get into the courtroom and see the well things begin to even

out. For many law students, schooled in the majesty and ineluctable logic of the law, it presents an almost incomprehensibly dissonant scene. So often, students experience cognitive dissonance when they start looking around in criminal court.

For many, race is the most striking and troubling feature. Simply put, almost all of the folks who are not lawyers or court employees are Black or Latino. There is a smattering of Asians and some white people, but most of the apparent defendants, and many of the court officers, are people of color. Race is a very charged category for most of my students, as for most Americans. Tending, as we do, to make sense of the world by interpreting new data to keep it consistent with our prior beliefs, many of us quickly adopt a comfortable assumption about the role of race in the courthouse and move on. So, we might think, or half think, that although there a lot of people of color, there are also other people and the process is fair. Alternatively, we might think that these are the people who commit crimes, and assume that this new information supports what feels like a data driven observation. Whatever the thought, those initial efforts to make sense of this rush of information are driven not by respectful reflection but by the need to resolve the dissonance and tell a story that will get us through the day.

Another notable feature in that courthouse is that most cases are dealt with in very brief appearances, in which little is said by the judge or the lawyers and all of it is likely to be an incomprehensible jumble of statute numbers and terms of art. This is also at odds with the magisterial view of law and justice in America. Again, many of us strive to relieve the dissonance by assuming that all the lawyers and judges are great experts, or that there are so many cases that they have no choice, or by making up some other broad story about the court. Without a guide or enough experience to understand what is happening, it is impossible to make any useful, intelligent judgement about what is happening. But most of us will still fill in the details and tell a story that is consistent with our prior beliefs. For so many law students, that story will vindicate the majesty of the law.

We give our students a different experience. When they come to the courthouse in the beginning part of the semester, they are, to some degree, focused on the technical details and their apprehension about actually representing their clients. This narrowing of perspective is a good thing, as it may discourage them from focusing on and leaping to conclusions about the bigger questions. It gives them an odd sort of space in which to take in data. We have encouraged that narrow focus, perhaps by accident at first, as we have front-loaded the readings on the law and our skills instruction to prepare them to pick

up cases early in the semester. But they come to a more sophisticated understanding in the end, because they feel less pressure to come to a conclusion at the start.

### CONCLUSION

In the end, I think the success of our live client, small case, teaching and learning centered, criminal defense clinic in an urban setting is rooted in our shared seriousness about and joy in the practice of law. Over the past few semesters we have created a context in which our students can reflect carefully upon a set of experiences important enough to care about, but not so important as to overwhelm them; complex enough to learn important lessons from, but not so complex as to impede seeing them whole in a semester. By placing our students in professional relationships with people who are facing difficult situations, we give them the opportunity to think through and feel morally and emotionally complex situations in a supportive, controlled setting. Because they are smart, able people, they face the challenges our work poses and grow during our time together. Our live client, small case, teaching and learning centered clinic in an urban setting is a traditional clinic that works.



